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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2006

CORAM

THE HONOURABLE MR. JUSTICE K.N.BASHA

Criminal Appeal No.21 of 2003

P.Eswaran .. Appellant/Complainant

Vs.

J.A.Abdul Hameed, .. Respondent/Accused

* * *

Appeal against the Judgment dated 22.11.2002 made in C.C.No.134 of 1996 on the file of the learned District Munsif-cum-Judicial Magistrate, Avinashi.

* * *

For Appellant :: Mr.M.Deivanandam
for Mr.G.R.Swaminathan

For Respondent :: Mrs.Vedavalli Kumar
Legal Aid Counsel

J U D G M E N T

This appeal is preferred by the complainant challenging the Judgment of acquittal passed by the Judicial Magistrate, Avinashi, in C.C.No.134 of 1996 dated 22.11.2002 acquitting the accused for the offence under Section 138 of Negotiable Instruments Act (for short "The Act").

2. The case of the complainant is that on 10.04.1996, the accused borrowed Rs.2,50,000/- from him with a promise to return the same within a period of two months. Thereafter, the complainant made several reminders to the accused to repay the amount and ultimately on 10.05.1996, the accused issued a cheque, Ex.P.1, dated 10.05.1996 for a sum of Rs.2,50,000/- drawn on State Bank of India, Avinashi Branch, in favour of the complainant. The complainant further stated that on 23.08.1996, he has deposited the cheque, Ex.P.1, dated 10.05.1996 before the State Bank of India, Avinashi. Thereafter, the cheque was dishonoured on the ground of "Insufficient Funds". Ex.P.2 is the Banker's Memo. Ex.P.3 is the State Bank of India, Bank Chalan, dated 23.08.1996. Thereafter,

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the complainant sent a registered legal notice, Ex.P.4, dated 26.08.1996 calling upon the accused to pay the amount towards the dishonoured cheque. The accused gave a reply, Ex.P.5, dated 07.09.1996, denying the averments contained in the legal notice sent by the complainant. The complainant sent a rejoinder notice under Ex.P.6 dated 17.09.1996. But in spite of receiving the notice and even after 15 days from the receipt of the notice, the accused failed to pay the amount towards the dishonoured cheque, Ex.P.1 and therefore the complainant stated that the accused has committed the offence punishable under Section 138 of the Act.

3. The complainant, in order to prove his case, examined himself as P.W.1 and examined P.W.2, the Accountant of the State Bank of India and the complainant marked Exs.P.1 to P.9.

4. When the accused was questioned under Section 313 Cr.P.C., he denied his complicity in the offence and he has not chosen to examine any witness on his side and he has marked Ex.D.1, the reply notice sent by him to the complainant dated 12.10.1996.

5. The learned Magistrate on consideration of the entire evidence available on record through the evidence of P.Ws.1 and 2 as well as the Exs.P.1 to P.9 and Ex.D.1 has come to the conclusion that the complainant has not proved his case for establishing the ingredients of the offence under Section 138 of the Act, by adducing acceptable evidence and acquitted the accused on the following grounds:

i. The complainant has not stated in his legal notice, Ex.P.4 for what purpose the amount was given by him to the accused as a loan and it is also not mentioned on what date the amount was paid.

ii. There is no explanation for presenting the cheque, Ex.P.1, dated 10.05.1996 only on 23.08.1996 and therefore the defence version that the accused gave two blank cheques while he joined in the chit funds organised by the complainant as security for taking the chit amount and the complainant has filled up one of the cheques and misused the same by foisting a case against the accused.

iii. The present version of the complainant that he has presented the cheque, Ex.P.1 dated 10.05.1996 on 23.08.1996 at the instruction of the accused, is not stated either in his notice, Ex.P.4 or in his complaint.

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iv. A perusal of the cheque, Ex.P.1, dated 10.05.1996 shows that the signature is in one ink and the letters written in the cheque is in different ink which raises doubt about the genuineness of Ex.P.1.

v. The complainant suppressed the material facts in his notice, Ex.P.4, complaint and in his chief examination and those materials are the issue of reply notice by the accused, Ex.D.1, and the particulars mentioned in the Ex.P.6, the rejoinder.

6. Learned counsel for the Appellant, while assailing the Judgment of acquittal submitted that the learned Trial Judge has given the findings for acquitting the accused which are all contrary to the law and facts. It is also submitted by the learned Counsel for the Appellant that the complainant has complied with all the mandatory requirements contemplated under Section 138 of the Act. The learned counsel for the appellant also submitted that the Trial Judge has committed error of law by placing reliance on irrelevant factors such as omission of certain particulars in Ex.P.4, Statutory Notice and also the complainant has not given the reason for giving loan to the accused. It is also submitted by the learned counsel for the appellant that the learned Trial Judge has wrongly held that the cheque, Ex.P.1, was given by the accused as security, while availing the chit amount from M/s.Eswaran Chit Fund. The learned counsel for the appellant further contended that the accused has failed to rebut the presumption contemplated under Section 139 of the Act and as such it has to be held that the cheque, Ex.P.1, issued by the accused is towards the legally enforceable liability.

7. Per contra, Mrs.Vedavalli Kumar, learned counsel appearing for the respondent/accused contended that the learned Trial Judge has given clear and categorical reasons based on the materials available on record for passing the order of acquittal. The learned counsel for the respondent/ accused further submitted that the learned Trial Judge has rightly held that neither in Ex.P.4, statutory notice, nor in his complaint the complainant has stated the reason for giving loan of Rs.2,50,000/- to the accused. It is also contended by the learned counsel for the respondent/accused that there is absolutely no explanation given by the complainant that why the cheque issued on 10.05.1996 was deposited by him only on 23.08.1996, nearly after a period of three months, and that the conduct of the complainant itself throws considerable doubt about his version to the effect that the cheque, Ex.P.1, was issued by the accused towards the legally enforceable liability. It is also pointed out by the learned counsel for the respondent/ accused that the present version of the complainant in the deposition that he

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has deposited the cheque on 23.08.1996 at the instruction of the accused is neither mentioned in his statutory notice, Ex.P.4 nor mentioned in his complaint and therefore it is a clear case of afterthought and made only with a view to fill up the lacuna. The learned counsel for the respondent/accused also contended that several material factors were not mentioned in Ex.P.4, Statutory notice, sent by the complainant to the accused. It is further submitted by the learned counsel for the respondent/accused that the defence theory of the complainant receiving two blank cheques while the accused availed the chit fund amount through M/s.Easwaran Chit Fund running by the complainant is also probabilised by the materials available on record. The learned counsel for the respondent/accused lastly submitted that the accused has rebutted the presumption contemplated under Section 139 of the Act by eliciting answers in the cross-examination of the evidence of P.W.1, the complainant, as well as through circumstance and preponderance of probabilities of the case and the learned counsel placed reliance on the decision in BHARAT BARREL AND DRUM MANUFACTURING COMPANY VS. AMIN CHAND PAYRELAL reported in AIR 1999 SC 1008.

8. I have given my careful consideration to the rival contentions put forward by either side.

9. The entire perusal of records including the impugned judgment as well as the deposition shows that the complainant has chosen to examine himself to prove his case and also produced certain documents, Exs.P.1 to P.9. The sum and substance of the allegation of the complainant is that the accused borrowed a sum of Rs.2,50,000/- from him on 10.04.1996 and after repeated demand he has issued a cheque, Ex.P.1, dated 10.05.1996, for an amount of Rs.2,50,000/- in his favour and when the same was deposited in his Bank viz., State Bank of India, the cheque was returned with the endorsement "Insufficient Funds" and thereafter he has sent the statutory notice, Ex.P.4, calling upon the accused to settle the amount towards the dishonoured cheque and the accused in spite of receiving the same not settled the amount within 15 days from the date of receipt of the notice and thereby he has committed the offence under Section 138 of the Act. The undisputed fact remains that according to the complainant P.W.1, an amount of Rs.2,50,000/- was borrowed by the accused on 10.04.1996 but except the oral statement of P.W.1, there is no material produced by the complainant to prove that he has given the amount on 10.04.1996. It is also relevant to note at this juncture that P.W.1 has also not stated that whether he has given that amount by way of cash or by way of cheque in favour of the accused. Even in the notice, Ex.P.4, it is not stated by P.W.1 on what date he has given the amount to the accused though the present version is that he has given the amount on 10.04.1996 and it is also not stated about the

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mode of payment whether he has given that amount by cash or by way of cheque and it is also stoutly denied by the accused that he has issued the cheque, Ex.P.1 for an amount of Rs.2,50,000/- dated 10.05.1996.

10. The defence is that the accused was one of the subscribers in the unregistered chit fund business run by the complainant and the complainant has received two blank cheques and one blank promissory note as security for the purpose of receiving the chit amount and the said blank cheques were misused by the complainant. This defence version is probabilised by the fact that the complainant/P.W.1 has received the reply sent by the accused under Ex.D.1 addressed to the complainant mentioning the address as M/s.Eswaran Chit Funds and the same was received by the complainant and the complainant also admitted the same in his cross-examination.

11. Yet another infirmity in the case of the prosecution is that in the cheque, Ex.P.1, the signature is in one ink and the wordings in respect of the amount is in a different ink which also raises doubt about the version of the complainant and also probabilised the defence theory that the complainant could have misused the two blank cheques said to have received by the complainant during the course of the chit transaction.

12. It is also relevant to note that the cheque, Ex.P.1 is dated 10.05.1996 but the same was deposited by the complainant only on 23.08.1996 and there is absolutely no reasonable and probable explanation given by the complainant for the delay of more than three months in depositing the cheque, Ex.P.1, into his Bankers for collection of the amount. The present version of the complainant in the deposition that he has deposited the cheque, Ex.P.1 dated 10.05.1996 on 23.08.1996 at the instruction of the accused is neither mentioned in the statutory notice, Ex.P.4, nor mentioned in his complaint and therefore it is rightly contended by the learned counsel for the respondent that the complainant has come forward with the developed version and such version is made only with a view to fill up the lacuna.

13. The presumption contemplated under Section 139 of the Act is rebuttable presumption. The learned counsel for the appellant cited the following authorities :

(1)K.N.BEENA VS. MUNIYAPPAN & ANR. reported in 201(4) Crimes 376 (SC)
(2)GOA PLAST (P) LTD. VS. CHICO URSULA D'SOUZA reported in 2004 SCC (Cri.) 499 to the proposition that under Section 139 of the Act, the onus is on

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the accused to rebut the presumption and it is not the complainant to prove that the cheque was issued towards the legally enforceable liability.

This court is also of the considered view that it is the burden on the accused to rebut the presumption. Therefore, this Court is left with the consideration whether the accused in this case has rebutted the presumption contemplated under Section 139 of the Act.

14. The Hon'ble Supreme Court of India in HITEN P.DALAL VS. BRATINDRANATH BANERJEE reported in 2001 SCC (Cri.) 960 held that,

> "It is obligatory on the court to presume the liability of the drawer for the amount of the cheque in eery case where the factual basis for such presumption is established - Such a presumption can be rebutted by the drawer by proving on evidence that the holder of the cheque had not received the same towards the discharge of any liability - Such rebuttal does not have to be conclusively established - The court must either believe the defence to exist or consider its existence to be reasonably probable".

15. In yet another case the Apex Court in BHARAT BARREL AND DRUM MANUFACTURING COMPANY VS. AMIN CHAND PAYRELAL reported in AIR 1999 SC 1008, while considering the similar provision that of Section 139 viz., Section 118 of the Act regarding the rebuttal of presumption has held as follows :

> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led

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> in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable hs to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff."

Therefore, in view of the above settled principles of law, this Court is of the considered view that the accused in this case has rebutted the presumption contemplated under Section 139 of the Act by eliciting answers in the cross-examination and also by preponderance of probabilities on the basis of the following materials available on record viz.,

(1) The signature in the cheque, Ex.P.1, is in one ink and the contents of the said cheque is in a different ink which raises doubt and also probabilise the defence theory that the complainant might have received the blank cheque and subsequently filled up the amount etc.
(2) The defence theory of joining as a subscriber in the chit transaction conducted by the complainant and while availing the chit amount the complainant has received two blank cheques as security and the same was misused by the complainant on the ground that the complainant has admitted in his cross-examination that the reply notice, Ex.D.1, sent by the accused which was addressed to the complainant mentioned the address as Eswaran Chit Funds, Avinashi, is said to have been received by the complainant.
(3) No explanation for depositing the cheque, Ex.P.1 dated 10.05.1996 after more than three months viz., on 23.08.1995 by the complainant is also throws considerable doubt about the veracity of his version. The present explanation that the complainant deposited the cheque, Ex.P.1, as per the instruction of the accused is neither mentioned in the statutory notice, Ex.P.4 nor mentioned in his complaint.

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(4) The mode of payment of the amount of Rs.2,50,000/- as loan is not mentioned by the complainant in his statutory notice, Ex.P.4 or in his complaint whether he has paid the amount by cash or by cheque.

(5) Though P.W.1 claimed that there are enough sources for giving loan of Rs.2,50,000/- to the accused and also stated that he has mentioned the same in the Income Tax Return, the complainant has not produced those Income Tax Return to substantiate his version.

16. The learned Trial Judge has also considered the above said aspects and given the categorical reasons for acquitting the accused in this case and it cannot be stated that the learned Judge has overlooked or misread any evidence available on record and as such nothing warrants this Court to interfere with the Order of acquittal. Accordingly, the Appeal is dismissed.

Gg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. THE DISTRICT MUNSIF CUM JUDICIAL MAGISTRATE,
AVINASHI.

+ 1 cc to Mr. Vedavalli Kumar, Advocate SR No.32213

+ 1 cc to Mr. G.R. Swaminathan, Advocate SR No. 33488

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MRD(CO)
SR/23.8.2006

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